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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. STEVE RIVERS, Defendant and Appellant.	B180235 (Los Angeles County Super. Ct. No. ZM005746)

APPEAL from a judgment of the Superior Court of Los Angeles County, C. Edward Simpson, Judge. Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R. Duarte and Dawn S. Mortazavi, Deputy Attorneys General, for Plaintiff and Respondent.

Steve Rivers appeals from a judgment entered after a jury found that he was a sexually violent predator (SVP) within the meaning of Welfare and Institutions Code section 6600 et seq., the Sexually Violent Predators Act (SVPA).[1] He was committed to the Department of Mental Health for two years. We affirm the judgment (order of commitment).

FACTUAL AND PROCEDURAL BACKGROUND

In 1994, appellant was convicted of a forcible lewd act on a child (Pen. Code, § 288, subd. (b)) and of a lewd and lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (a)). He was sentenced to 11 years in prison for those two offenses. On October 18, 2002, a petition was filed by the District Attorney of Los Angeles County alleging that appellant had committed two predicate offenses within the meaning of the SVPA, that he had a diagnosed mental disorder, and that he posed a danger to the health and safety of others. Appellant was then moved to Atascadero State Hospital (Atascadero). A jury trial was held in November 2004. At the trial, the People presented two psychologists as expert witnesses, and appellant called five psychologists. Appellant also testified on his own behalf. The People then called a rebuttal witness, another psychologist, and the jury returned a verdict on December 1, 2004.

CONTENTIONS ON APPEAL

Appellant contends that there was insufficient evidence to support the jury's finding that he was likely to commit another sexually violent predatory offense if released from custody, that the court erred in allowing the People to present a rebuttal witness, and that the SVPA violates the ex post facto and equal protection clauses of the United States Constitution.

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[1] All further statutory references shall be to the Welfare and Institutions Code unless otherwise indicated.

DISCUSSION

A. The SVPA

"The SVPA provides for the involuntary civil commitment of an offender immediately upon release from prison, for a two-year period, if the offender is found to be an SVP. The civil commitment can only commence if, after a trial, either a judge or a unanimous jury finds beyond a reasonable doubt that the person is an SVP (§§ 6600, 6601, 6603, 6604). [Fn. omitted.] [¶] An SVP is defined in section 6600, subdivision (a)(1), as 'a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' [Fn. omitted.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 243.)

"First, there is a hearing before the superior court to decide '"whether there is 'probable cause' to believe the person named in the petition is likely to engage in sexually violent predatory criminal behavior upon release."' ([*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888,] 904, quoting *Hubbart* [*v. Superior Court* (1999) 19 Cal.4th 1138,] 1146; see § 6602.) If the court decides such probable cause exists, the matter proceeds to trial, at which either party can demand that trial be by jury. (§ 6603, subds. (a) & (b).) Proof that the person qualifies as a sexually violent predator must be beyond a reasonable doubt (§ 6604), and a jury's verdict must be unanimous (§ 6603, subd. (d)). Moreover, the trier of fact must determine not only that the defendant is '*likely* [to] engage in sexually violent behavior' (§ 6600, subd. (a)), but also whether that behavior would be 'directed "toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (§ 6600, subd. (e).)' (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1182.)" (*People v. Roberge* (2003) 29 Cal.4th 979, 985.) "[A] person is 'likely [to] engage in sexually violent criminal behavior' if at trial the person is found to present a *substantial danger*, that is, a *serious*

and well-founded risk, of committing such crimes if released from custody. [Fn. omitted.]" (*Id*. at p. 988.)

B. Sufficiency of the Evidence

On appeal, there is no dispute over the commission of the predicate offenses, nor with the diagnosis of mental disorder. The only element over which the experts disagreed was whether appellant was a danger to the health and safety of others because of his likelihood of reoffending. (§ 6600, subd. (a)(1).) We therefore summarize only those portions of their testimony.

Dr. Starr

Dr. Dawn Starr, a psychologist, testified as an expert witness for the People. She was under contract with the Department of Mental Health (the Department) for SVP evaluations. She was employed for nine years at Atascadero as a staff psychologist and an admissions evaluator. She initially met with appellant in 2002 while he was in prison and reviewed all his legal and medical files before that interview. She did not speak with appellant's treatment providers at state prison or any of his family members. She admitted she was not familiar with the Department of Parole's treatment program.

Starr explained that the "Static 99" is an actuarial measurement which gives a numerical risk percentage of sexual reoffense based upon 10 factors. On the Static 99 test, she gave appellant a score of seven or eight. Fifty-two percent of those individuals with scores of six or above suffer a new sex-related conviction within 15 years. Even without this test, she would have found that he would have qualified as an SVP. She acknowledged that appellant volunteered to get treatment while in custody but did not think that treatment alone was enough to lower his risk of reoffending. She was concerned that because of his self-pity, resentment, and poor interpersonal relationships, his chances of reoffending were increased. These risk factors also raised concerns about his ability to voluntarily participate in treatment. His statement that he would avoid high risk situations was inconsistent with his history or personality assessment.

Dr. Hupka

Dr. John Hupka, a psychologist who performed an SVP evaluation for the Department, testified that appellant met all three criteria under the SVP law: that he had been convicted of the qualifying offense, that he suffered a diagnosed mental disorder that impairs his emotional and volitional capacity in a manner that predisposed him to engage in sexually violent criminal behavior, and that he was likely to engage in sexually violent criminal behavior in the future by reason of that mental disorder. Hupka first met with appellant in August 2002, in prison. Prior to that time he reviewed all of appellant's prison and medical files. He did not believe that appellant had changed since that time since he had chronic conditions. He would not be able to manage his sexual deviance voluntarily and in the community on a long-term basis, and was thus likely to commit sexually violent predatory offenses. He also interviewed appellant again in December 2003.

Hupka admitted that appellant had actively sought out and participated in treatment and had matured while in custody, but Hupka still believed appellant's sexual deviance and psychological problems were quite severe and that he was likely to reoffend if released from custody. He opined that if appellant were in a well-structured mandatory outpatient treatment program he might not reoffend. However, Hupka testified appellant would not be amenable to voluntary treatment. On cross-examination, he admitted that he had never worked in a formal sex offender therapy program. He admitted he did not contact any of the people who provided appellant with treatment, or his family, and did not visit him over the past year. He did not talk to the team who had been treating him at Atascadero for the last year but had reviewed their records. He agreed that sex offenders are not likely to reoffend. On redirect, he reiterated that the risk factors for appellant were the profound history of sexual deviance and his behavioral history in the community.

Dr. Anderson

Appellant called Dr. Raymond Anderson, a clinical psychologist and currently a director of a clinic for the research, assessment, and treatment of sex offenders. He interviewed appellant in 1993 and felt that he had a strong desire for treatment. He interviewed him for about three hours in 2004. He had read the reports of Drs. Malinek, Starr, Maram, and Davis. He felt that after appellant had gone through the Department of Corrections's sex offender treatment program, he had matured, was sober, and had improved his relationship with his family such that he would be treatable as an outpatient. He opined that appellant's likelihood of reoffending was low and that he would be the kind of offender that could be treated successfully in the community. He admitted on cross-examination that he was not familiar with the program at Atascadero where appellant had spent the last year, had never been employed by the Department, and had never attended any of its training sessions. He had worked for the Department as a contracted psychologist evaluator, had testified about 45 times for the defense, and had never testified in favor of the prosecution. He did not feel that appellant's diagnosis of paraphilia predisposed him to the possibility of a sexually violent offense. He felt that appellant had changed from 1993, was an "entirely regenerated person," and did not have the same irrational beliefs about his future or the same mistaken ideas about his self-worth. Dr. Anderson testified that he had reviewed the reports of Drs. Maram, Malinek, Davis, and Starr, but could not say he had reviewed Dr. Hupka's report recently.

Dr. Maram

Dr. Wesley Maram testified that he was a psychologist who was on the Department's panel for SVP violations but rarely testified for the defense. He saw appellant in March 2004 for a three and one-half hour interview. He completed his report after he spoke with Dr. Malinek. He also reviewed the reports of Drs. Adams and Davis. Maram stated in his report that appellant has "nearly complete control over his behavior regarding adolescent females," but he did not believe that appellant would have a problem with exhibitionism after his release. He believed that appellant would be

aroused by children for the rest of his life. He felt it was appropriate for appellant to receive sex offender psychotherapy for 15 to 20 years. If released from custody, appellant would have problems adjusting and would have a struggle but "he has learned to manage it in such a way that he can be well controlled in the community." On the Static 99 test Dr. Maram gave appellant a score of eight, which meant that in five years, appellant had a 39 percent chance of reoffending, and in 10 years, a 45 percent chance, and in 15 years, a 52 percent chance. He felt that there was a possibility that appellant would need to attend therapy for 15 to 20 years or a lifetime. He still thought the likelihood was low that appellant would commit another offense but said, "I can't predict he'll never commit an offense."

Dr. Malinek

Dr. Hy Malinek testified that he was a psychologist on the Department's panel as an evaluator for SVP candidates and had completed approximately 250 of those evaluations, mostly for the defense. He reviewed appellant's medical file and reports from Drs. Hupka, Starr, Adams, Davis, and Maram. He concluded that appellant was a higher risk offender but could be managed in the community on an outpatient basis. He admitted that appellant had no access to female teenage victims while in state prison or the state hospital. On the Static 99 test he scored appellant as a seven, which meant high risk. A score of six or higher means that 52 percent of offenders would suffer a new conviction within 15 years. He thought appellant would probably voluntarily partake of therapy once released. Appellant told him in his interviews that his sexual deviance was "huge" and acknowledged that he is a high risk offender. His openness suggested motivation to Dr. Malinek.

Dr. Davis

Dr. Beryl Davis was a psychologist who was a member of the Department's panel for SVP evaluations. Appellant asked for treatment as soon as he came to prison. She interviewed him for three hours and found he had a good understanding of relapse

prevention and the potential damaging effects of his behavior. She believed that even if he were not on parole, he would seek outpatient treatment and would seek it for the rest of his life. She saw him as "significantly changed" from the time he committed the predicate offenses. On the Static 99 test she gave him a score of seven, which is in the high risk category, and believed that it was a "moderately accurate" assessment tool in predicting sexual recidivism. He had extensive relapse prevention and she thought that would help him. She felt that exhibitionism, which was part of appellant's diagnosis, was one of the hardest types of sexual behaviors to control, but his behavior while incarcerated indicated that he had maintained control. Dr. Davis had not reviewed appellant's Atascadero records.

Dr. Adams

Dr. Jay Adams testified that she was a psychologist who treated appellant in a therapy group for more than four years. She felt he was highly motivated, quite distressed by his deviant behavior, and attended the group therapy on a regular basis. He was open and willing to explore things which were relevant to his offenses. She felt that he was able to recognize his risk factors. She believed he would seek treatment as an outpatient and was not likely to reoffend. She testified there might be times when he experienced stress or depression and might need to seek therapy, but she did not think he needed lifetime therapy. She based her opinion on her lengthy observation of appellant and felt he was someone who really wanted to change his behavior.

Dr. Owen

Dr. Robert Owen testified that he was asked to be a rebuttal witness and had reviewed the reports of all the doctors who testified in this case to see if their conclusions "really were based upon the data and to render opinions about that." He did not interview appellant or the other witnesses. He stated that he disagreed with all the defense experts and after reviewing all the data and relying on his experience with sex offenders who had been released from custody, it was his opinion that appellant posed a substantial risk of

committing new sexual offenses in the community. He had trained at Atascadero and had treated approximately 300 sex offenders while in private practice and had testified in 200 SVP cases, most of the time for the People. He did not feel that appellant's commitment to seeking treatment, his remorse, or victim empathy was enough to keep him from reoffending because of his multiple diagnoses.

In attacking the sufficiency of the evidence, appellant argues that Dr. Starr never spoke with appellant's treatment providers, did not know of his time spent at Atascadero, and did not know about the Department of Parole's treatment program. He also contends that Dr. Hupka never talked to appellant's family or appellant's treatment team. Appellant points to the facts that he remained sober, never exhibited any sexual behavior in prison, and voluntarily sought out treatment and suggests this is evidence he is no longer a danger to the community. He claims that in treatment he learned how to identify risk triggers and learned coping strategies.

In an appeal of an SVP commitment, the test for sufficiency of the evidence is the same as for criminal convictions, in other words, we review the entire record in the light most favorable to the judgment and may not determine the credibility of witnesses, or reweigh any of the evidence. (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52; *People v. Sumahit* (2005) 128 Cal.App.4th 347, 352.) There was ample testimony from Drs. Starr and Hupka that appellant would offend if released into the community. In addition, all the psychologists agreed that he fell within the high risk category of the Static 99 assessment, and the jury heard what appellant's score meant in terms of the likelihood he would be convicted of another sex offense.

Appellant would have us disregard the testimony of Drs. Starr and Hupka and instead find his witnesses to be more persuasive, a task which is not ours. It is the duty of the jury to weigh the evidence and we will not disturb its decision where, as here, it is supported by the evidence. There is nothing in the record which establishes that the witnesses for the People overlooked any facts, or were not aware of his active participation in treatment and his behavior in custody. Appellant is also urging us to place more weight on his experts simply because there are more of them. Even the

testimony of one expert witness would be sufficient to sustain the verdict. (*People v. Panah* (2005) 35 Cal.4th 395, 489; *People v. Zavala* (2005) 130 Cal.App.4th 758, 766.) There is no merit to appellant's contention that the jury's verdict was unsupported by the evidence.

C. Rebuttal Witness

During pretrial proceedings, the prosecution informed appellant about its intent to call a rebuttal witness. Appellant's counsel objected, citing several cases for the proposition that the People could not withhold material that it otherwise could have used in its case-in-chief. The court deferred its ruling until after it heard the defense evidence.

After appellant rested, his counsel renewed her objection to the rebuttal, saying that there was no discovery provided regarding this witness, even after requesting an offer of proof. The prosecution stated that the witness was going to testify "to address the thrust of the defense in this case . . . that [appellant] does not meet . . . the third prong of the sexually violent predator statute." The court responded: "As I understand this witness, the People put on evidence through two expert witnesses. Those witnesses' opinion, the defendant was likely to become engaged in sexually violent predatory criminal behavior unless he is confined within a secure facility. The defendant, excuse me, the respondent put on a considerable amount of evidence to the effect that in the opinion of those psychologist[s], the defendant was not likely to engage in sexually violent predatory behavior . . . and the discovery, I understand then, or do the People have a right to attempt to rebut the opinions of the respondent's doctors; namely whether the respondent is likely to engage in sexually violent predatory criminal behavior unless confined within the secure facility. [¶] . . . [¶] . . . Your objection was noted and was overruled."

Later, after the rebuttal witness, Dr. Owen, had started testifying and appellant's counsel objected to his statements, the court stated, "I think that this is appropriate rebuttal. I'm not concerned with any discovery violations. I think that the respondent

will have ample opportunity to cross-examine Mr. Owen for the purpose of allowing the jury to give his testimony what weight it deserves."

Penal Code section 1093, subdivision (d) provides that in a criminal trial, "The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case."

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. [Citations.] *In People v. Carter* [(1957)] 48 Cal.2d [737,] 753-754, we stated 'proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.' Restrictions are imposed on rebuttal evidence (1) to ensure the presentation of evidence is orderly and avoids confusion of the jury; (2) to prevent the prosecution from unduly emphasizing the importance of certain evidence by introducing it at the end of the trial; and (3) to avoid 'unfair surprise' to the defendant from confrontation with crucial evidence late in the trial. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1211; *Carter*, at pp. 753-754.)" (*People v. Young* (2005) 34 Cal.4th 1149, 1199.)

"Testimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence may properly be admitted in rebuttal. [Citations.]" (*Id.* at p. 1199.)

Appellant contends that Dr. Owen's testimony was flawed because he never interviewed appellant or his treatment providers. However, Dr. Owen's testimony was properly presented on rebuttal as an attack on the defense experts' analyses, as he challenged their conclusions. It was not testimony which could have been presented as part of the case-in-chief.

In particular, Dr. Owen rebutted appellant's evidence that suggested he would voluntarily seek treatment and that one in treatment is not a danger to the community. Appellant relied heavily on testimony from doctors who, unlike the two prosecution

doctors, had treated appellant. He argued that treatment meant he had gained insight into his problems and he was therefore less likely to reoffend. Thus, the People had a right to offer evidence contrary to appellant's position. The court did not abuse its discretion in admitting this testimony which properly challenged defense testimony. (*People v. Harris* (2005) 37 Cal.4th 310, 336.)

D. Constitutional Challenges

1. Waiver

The People contend that because appellant did not raise any constitutional challenges to the SVPA in the trial court, he is precluded from raising them on appeal. The cases cited by the People, however, deal only with evidentiary challenges. Assuming that he did not waive these arguments by his failure to raise them below (*People v. Calderon* (2004) 124 Cal.App.4th 80, 94), we find the claim has no merit.

2. Ex Post Facto Clause

In *Kansas v. Hendricks* (1997) 521 U.S. 346, the United States Supreme Court rejected an ex post facto challenge to the Kansas SVP commitment scheme. In *Hubbart v. Superior Court*, *supra*, 19 Cal.4th 1138, the California Supreme Court relied upon *Hendricks* in finding that the California SVP statutes do not violate the ex post facto clause.

Appellant contends that the SVPA is different from the Kansas statute because it is punitive in nature and its primary purpose is not to provide meaningful treatment. He also argues that because the SVPA requires treatment at the end of a prison term, the treatment provisions are pretextual.

Hubbart, however, has already disposed of that contention. "Whether it is viewed in its original form or in light of amendments that have since been made, the SVPA cannot be meaningfully distinguished for ex post facto purposes from the Kansas scheme considered in *Hendricks*[, *supra*, 521 U.S. 346]." (*Hubbart*, *supra*, 19 Cal.4th at p. 1175.) "[T]he SVPA does not 'affix culpability' or seek 'retribution' for criminal

conduct. [Citation.] Here, as in *Hendricks*, prior sexually violent offenses are used 'solely for evidentiary purposes' to help establish the main prerequisites upon which civil commitment is based—current mental disorder and the likelihood of future violent sex crimes. [Citation.] To ensure that commitment occurs only under these circumstances, the SVPA requires that the jury be specially instructed about the limited evidentiary role of prior violent sex crimes. [Citation.] Under these circumstances, the SVPA does not impose liability or punishment for criminal conduct, and does not implicate ex post facto concerns insofar as pre-Act crimes are used as evidence in the SVP determination." (*Ibid*.)

With regard to the second portion of appellant's argument, the *Hubbart* court also discussed a similar contention raised in *Hendricks*, stating, "Viewed as a whole, the SVPA is also designed to ensure that the committed person does not 'remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.' (*Hendricks*, *supra*, 521 U.S. 346, 364.) In general, each period of commitment is strictly limited and cannot be extended unless the state files a new petition and again proves, beyond a reasonable doubt, that the person is dangerous and mentally impaired. (§ 6604.) Although committed for two years, the SVP is entitled each year to a new mental examination and to judicial review of the commitment to determine whether his condition has changed such that he no longer poses a danger to the health and safety of others. . . . [¶] . . . In light of the foregoing provisions, Hubbart has not established that the SVPA imposes 'punishment' by continuing the confinement of persons who are no longer dangerously disturbed. [Fn. omitted.]" (*Hubbart, supra,* 19 Cal.4th at p. 1177.)

Based upon *Hubbart*, we reject appellant's ex post facto claim.

3. Equal Protection

Appellant also claims that the SVPA violates the equal protection clause because there is no rational basis for the disparate treatment of mentally disordered offenders

(MDO's), who cannot be committed unless the individual poses a substantial danger of physical harm to others, and SVP's.

Several appellate courts have rejected this claim and we see no reason to depart from their rulings. "It has been well established that the [MDO's and SVP's] are not similarly situated in all respects. (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1221-1222 [*Hubbart II*].) For example, the definition of mental disorder under the SVPA is less exacting than the one under the MDO commitment scheme. (*Id*., at pp. 1217-1218.) Also, SVPA requires a finding that the person is likely to commit violent sex crimes [in the future], whereas MDO commitments require a present threat of harm. (*People v. Poe* (1999) 74 Cal.App.4th 826, 833.)" *(People v. Calderon*, *supra*, 124 Cal.App.4th at p. 94; *People v. Buffington* (1999) 74 Cal.App.4th 1149, 1158.) In addition, under the SVP, the defendant need not be incarcerated for a qualifying offense, and the MDO Act (Pen. Code, § 2960 et seq.) is conditioned upon the person serving a prison term. Finally, there are different expectations related to treatment of MDO's and SVP's. For equal protection purposes the two groups are not similarly situated. (*Hubbart II, supra*, 88 Cal.App.4th at pp. 1221-1222.)

DISPOSITION

The judgment (order of commitment) is affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J. MANELLA, J.